



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2004

Mr. Lance Vanzant
Hayes, Berry, White & McMurray, L.L.P.
P.O. Box 50149
Denton, Texas 76206

OR2004-5388

Dear Mr. Vanzant:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 204429.

The Hickory Creek Police Department (the "department"), which you represent, received a request for a named officer's personnel and internal affairs files. You state that the department does not have an internal affairs file for this officer.¹ You also state that the department will provide the requestor with some of the requested information. You claim, however, that portions of the remaining requested information are excepted from disclosure under sections 552.117 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that Exhibit C is excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a

¹ The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You state that the submitted tests were "developed and administered by the [department] as part of their (sic) Field Training Officer Program." You also state that the department "continues to utilize this same test or portions thereof for new applicants." You assert that the questions and answers are excepted from disclosure under section 552.122(b). Having considered your arguments and reviewed Exhibit C, we agree that the submitted questions constitute "test items" as contemplated by section 552.122(b). We also find that, with the exception of the true or false questions, the answers to these questions may reveal the questions themselves. Accordingly, the department may withhold these questions and answers in Exhibit C pursuant to section 552.122(b) of the Government Code.

You claim that portions of Exhibit B are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024 or 552.1175.² Having reviewed Exhibit B, we understand the individual whose records are at issue to have been a peace officer at the time the department received this request. Therefore, under section 552.117(a)(2), the department must withhold the listed information concerning this individual. We have marked the information that the department must withhold.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal

² "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12.

Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b).³ Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety ("DPS") or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, to the extent that the submitted documents contain any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, the department must withhold any such information under section 552.101 of the Government Code.

In addition, we note that a portion of Exhibit B is excepted from disclosure pursuant to section 552.101 in conjunction with section 411.192 of the Government Code, which governs the release of all information maintained by DPS concerning the licensure of individuals to carry a concealed handgun. Section 411.192 provides:

[DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. [DPS] shall, on written request and payment of a reasonable fee to cover costs of copying, disclose to any other individual whether a named individual or any individual whose full name is listed on a specified written list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552, Government Code, except that the applicant or license holder may be furnished a copy of disclosable records on request and the payment of a reasonable fee.

Gov't Code § 411.192. Exhibit B contains information concerning an individual's concealed handgun license. Because section 411.192 makes this information confidential, we conclude that the department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code.

³ We note that the statutory definition of CHRI does not encompass driving record information maintained by the DPS under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2) (defining "criminal history record information").

The submitted information also includes a fingerprint. Sections 560.001, 560.002, and 560.003 of the Government Code govern the public availability of fingerprint information. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. We have marked the submitted information that is confidential under section 560.003. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the department must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state, a motor vehicle title or registration issued by an agency of this state, or a personal identification document issued by an agency of this state or authorized local agency. *See* Gov't Code § 552.130. Accordingly, the department must withhold the section 552.130 information we have marked.

Finally, we note that e-mail addresses that are contained within the remaining submitted information are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
 - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain email addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the remaining submitted information, we have marked the e-mail addresses that are excepted from disclosure under section 552.137(a). Unless the department has received affirmative consent for the release of these marked e-mail addresses, we conclude that it must withhold the addresses pursuant to section 552.137(a) of the Government Code.

In summary, we conclude that: 1) with the exception of the true or false answers, the department may withhold the test questions and answers in Exhibit C pursuant to section 552.122(b) of the Government Code; 2) the department must withhold the section 552.117(a)(2) information we have marked; 3) any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F; 4) the department must withhold the information that we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code; 6) the department must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code; 7) we have marked the information that is

protected by common law privacy and must be withheld under section 552.101 of the Government Code; and 8) the department must withhold the section 552.130 and 552.137 information we have marked. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

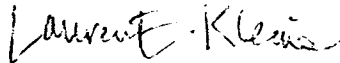
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 204429

Enc. Submitted documents

c: Ms. Rebecca Scott
Crosbie Moraine
1512 East McKinney, Suite 200
Denton, Texas 76209
(w/o enclosures)